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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 337

TIME, INC. and DAN JENKINS,
Petitioners,

v.

BON AIR HOTEL, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS AND ORDERS BELOW

Petitioners seek a writ of certiorari to the United States Court of Appeals for the Fifth Circuit from an order of that Court, denying petitioners leave to appeal from an order of the United States District Court for the Southern District of Georgia, Augusta Division, which denied petitioners' motion to dismiss and for summary judgment. The District Court had previously certified its order as appropriate for appeal pursuant to 28 U. S. C. § 1292(b). Petitioners also seek to review the order of the Court of Appeals denying petitioners' application for rehearing en banc or, alternatively, for rehearing of petitioners' application for leave to appeal. The original opinion and order of the District Court denying the motion to dismiss

and for summary judgment, rendered December 20, 1967, is attached hereto as Appendix A. The amended order of the District Court, entered December 23, 1967, certifying its order as appropriate for appeal is attached hereto as Appendix B. The order of the Court of Appeals for the Fifth Circuit denying leave to appeal, entered March 4, 1968, is attached hereto as Appendix C. The order of the United States Court of Appeals for the Fifth Circuit denying petitioners' application for rehearing, rendered April 30, 1968, is attached hereto as Appendix D.

JURISDICTION*

The order of the Court of Appeals denying petitioners' leave to appeal was entered March 4, 1968, and the order denying petitioners' application for rehearing was entered April 30, 1968. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. Did the Court of Appeals abuse its discretion in refusing to allow an appeal from denial of summary disposition in a case involving freedom of the press under the First and Fourteenth Amendments after the District Court had

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*Since no specific authority has been found (although we do not believe one is needed) allowing this petition from a denial of an application under 28 U. S. C. § 1292(b), by petition filed simultaneously herewith, petitioners are also applying for common law writs of certiorari pursuant to 28 U. S. C. § 1651(a), directed to the United States Court of Appeals for the Fifth Circuit and the District Court of the United States for the Southern District of Georgia, Augusta Division, in accordance with the doctrines established by this Court *In re 620 Church St. Corp.*, 299 U. S. 24 and *United States Alkali Export Ass'n, Inc.* v. *United States*, 325 U. S. 196.

certified that such denial involved a controlling issue of law as to which there was substantial ground for difference of opinion and there had been clear proof, uncontroverted and uncontrovertible, that

(a) the action is in libel based upon an article in the public press which qualified for constitutional protection under the First and Fourteenth Amendments since it contained statements, upon which suit was brought, concerning a public hotel owned by respondent and thus dealt with a "public figure" and a matter of public concern;

(b) affidavits and exhibits from petitioners' file, as well as petitioners' sworn responses to respondent's interrogatories (respondent having for over three years declined to examine those witnesses orally—although having directed interrogatories which were completely answered), showed that the article was written in good faith by an expert in the field, based upon an extensive investigation, with a rigorous independent check, and published in the belief, which continues to this day, that the article was true, thus qualifying for constitutional protection under the First and Fourteenth Amendments by summary disposition without the expense of trial; and

(c) respondent hotel owner explicitly disclaimed special damage, thus making mandatory dismissal of the action under the First and Fourteenth Amendments?

2. Under the circumstances set forth in question 1, did the Court of Appeals, under the Constitution, have discretion to refuse to review or was review under those circumstances mandatory?

3. Under the circumstances set forth in question 1, is the discretion of the Court of Appeals to refuse to review so narrow, or limited, under the Constitution and applicable decisions of this Court, as to mandate review?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the First and Fourteenth Amendments, United States Constitution, Amendment I, Amendment XIV, § 1.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or bridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U. S. Const., amend. I.
>
> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., amend. XIV, § 1.

STATEMENT

Respondent was the owner and operator of the Bon Air Hotel in Augusta, Georgia, a hotel which catered to persons attending the Masters' Golf Tournament and which had been one of the principal meeting places for persons

attending that Tournament. The Masters' Golf Tournament is one of the major sporting events in the country, attracting many thousands of persons to Augusta each year and capturing the interest of many millions throughout the country. The conditions in and around Augusta for the duration of the Masters' Golf Tournament are matters of public interest and are reported widely in the press (R. 3; D. 68).*

The April 6, 1964, issue of Sports Illustrated (owned and published by petitioner Time, Inc.) was devoted largely to the Masters' Golf Tournament. It contained an article, written by petitioner Dan Jenkins, describing the conditions under which the Tournament was held and accommodations in Augusta and described, among other things, conditions at the Bon Air Hotel, past and present. It is that article of which complaint is made is this action (R. 3; D. 68).

The man Time, Inc. chose to do this job was no neophyte to the world of golf or to Augusta. Since high school, he had been a sports reporter, rising rapidly from the coverage of sports events around Fort Worth, Texas, to writing his daily column, to directing the sports department of a major metropolitan newspaper. For over 15 years he had been writing about sports and about golf; for 13 years he had been visiting Augusta during the week of the Masters' Golf Tournament (R. 25; D. 47-8, 67-8).

Jenkins was assigned to write an article about the Tournament surroundings in Augusta. Of necessity, these surroundings included the hotel accommodations and the places where the persons attending the Tournament could meet (R. 25-26; D. 68).

Jenkins interviewed literally dozens of persons who had stayed at various places in Augusta, including the

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*Page references preceded by "R" are to the original record in the Court of Appeals, a certified copy of which has been filed with this petition. Page references preceded by "D" are to the original record in the District Court a certified copy of which has been filed with the companion petition for common law writs of certiorari.

Bon Air. Some of those names are set forth in his affidavit. He researched the files of Time, Inc. with respect to Augusta and its background. He studied newspaper clippings and consulted historical journals and volumes. Last but not least, he drew upon his own wide knowledge of the golfing world and his own experience during 13 years of the Masters' Golf Tournament. Thus, the job he did was one of careful research in the light of extensive experience. But, after his writing was finished, it was passed on to a Sports Illustrated researcher, Sarah Pileggi, who checked each and every statement of fact. She checked such facts by telephone conversations, by personal interviews, by consulting Time, Inc.'s files and by reading relevant published sources. An example of her correspondence was attached to her affidavit (R. 26-30; D. 47-50, 68-73).

Copies of the Jenkins and Pileggi affidavits in support of the motion for summary judgment are attached hereto as Appendices E and F. A review of the statements claimed to be false is attached hereto as Appendix G. Respondent made no effort, and none was possible, to dispute petitioners' good faith and belief in the truth of the article.

There is no claim of special damage in the complaint (D. 8) and respondent in its brief and argument below specifically disclaimed any such assertion (R. 8). A subsidiary benefit of the constitutional protection to which defendants are entitled bars a public figure plaintiff from recovery of any but special damage.

The Sports Illustrated article was published in April, 1964, and this action was commenced immediately thereafter and removed to the District Court. The action was previously dismissed for failure to produce an officer of plaintiff for the taking of his deposition, which dismissal was reversed by the Fifth Circuit on April 5, 1967. Thereafter, petitioners brought on for hearing a motion to dis-

miss the complaint for failure to state a cause of action, a motion which had been filed with petitioners' answers in this case, but not previously passed upon by the District Court. At the same time, and in order to raise all constitutional issues at one time, petitioners moved for summary judgment based upon affidavits of its employees giving full details concerning the writing of, and research for, the article upon which suit was brought. On December 20, 1967, those motions were denied by the District Court which by amended order on December 23, 1967, certified its order as appropriate for appeal to the United States Court of Appeals for the Fifth Circuit. On December 29, 1967, an application for leave to appeal was filed in the Court of Appeals. Thereafter, leave to appeal was denied on March 4, 1968. On March 25, 1968, a petition for rehearing was filed in the Court of Appeals. On April 30, 1968, that petition for rehearing was denied.

REASONS FOR INTERLOCUTORY REVIEW

In denying leave to appeal, the Court of Appeals failed to follow applicable decisions of this Court and reached a result which conflicts with the District of Columbia Circuit decision in *Washington Post* v. *Keogh*, 365 F. 2d 965 (D. C. Cir. 1966), *cert. den.*, 385 U. S. 1011. Respondent has not complied with the requirements of proof in *New York Times* based upon prior statements of principle in this Court and broadened in subsequent cases.*

*Those cases include doctrines announced in, among others: *Grosjean* v. *American Press Co.*, 297 U. S. 233; *Thornhill* v. *Alabama*, 310 U. S. 88; *Smith* v. *California*, 361 U. S. 147; *N. A. A. C. P.* v. *Button*, 371 U. S. 415; *New York Times Co.* v. *Sullivan*, 376 U. S. 254; *Garrison* v. *Louisana*, 379 U. S. 64; *Henry* v. *Collins*, 380 U. S. 356; *Dombrowski* v. *Pfister*, 380 U. S. 479; *Linn* v. *Plant Guard Workers*, 383 U. S. 53; *Rosenblatt* v. *Baer*, 383 U. S. 75; *Time, Inc.* v. *Hill*, 385 U. S. 374; *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130; *Beckley Newspapers Corp.* v. *Hanks*, 389 U. S. 81; *St. Amant* v. *Thompson*, U. S. , 88 Sup. Ct. 1323.

It never can comply with those requirements. If this case falls within the protection of those cases the litigation should be summarily ended without the burden of trial as was done in *Keogh*. Petitioners seek interlocutory review to determine that point.

As the litigation now stands, petitioners are required to present a common-law truth defense and have been denied interlocutory review despite the emphatic announcements of this Court that the First and Fourteenth Amendment protections extend not only to exposure to judgment but also to exposure to the cost of defense. *New York Times*, p. 279, *Hill*, p. 389.

Review is essential as well as expedient. If petitioners are correct in their contentions here presented, this must be terminated. Denial of review means that petitioners will have to defend below on truth and, if unsuccessful, later bring this same point before this Court. If successful (as we expect to be), petitioners' constitutional rights will have been violated because of the enormous expense involved, yet that violation can never be remedied, even by action of this Court. *Compare N. A. A. C. P.* v. *Button*, 371 U. S. 415, 432-33 *Dombrowski* v. *Pfister*, 380 U. S. 479, 486-87. The use of the summary procedure adopted here to obtain an adjudication of the legal questions presented here is presently scheduled in many cases throughout the United States. The effectiveness of such procedure can be protected only by review of its denial. A decision in this case will be important to the proper utilization of the constitutional guarantees.

Ordinarily, hardship to a litigant compelled to await correction of an alleged error at an interlocutory stage by an appeal from a final judgment is not an adequate reason for the Court to exercise its discretion to grant the writ. The broad discretion vested in a Court of Appeals to grant

or deny review under 28 U. S. C. § 1292(b) normally precludes review of its exercise. But where the litigation involves freedom of the press, other considerations come into play. This Court has indicated that the burden of trial may itself amount to unconstitutional hardship. As the Court has noted:

> ". . . Because of the sensitive nature of constitutionally protected expression, we have not required that all of those subject to overbroad regulations risk prosecution to test their rights. For free expression—of transcendant value to all society, and not merely to those exercising their rights—might be the loser. . . ." *Dombrowski* v. *Pfister*, 380 U. S. 479, 486.

The threat to free expression from the burden of litigation has led this Court to enjoin state criminal prosecutions that affected First Amendment freedoms:

> ". . . By permitting determination of the invalidity of these statutes without regard to the permissibility of some regulation of the facts of particular cases, we have, in effect, avoided making vindication of freedom of expression await the outcome of protracted litigation. Moreover, we have not thought that the improbability of successful prosecution makes the case different. The chilling effect upon the exercise of First Amendment rights may derive from the fact of the prosecution, unaffected by the prospects of its success or failure. . . ." *Id.* at 487.

The issue here is not whether the statements about respondent's hotel are true. Petitioners believe that they are true and, if necessary, they can prove that they are true. The issue is whether, consistently with the freedom of

press guaranteed by the First and Fourteenth Amendments, respondent by bringing this action can force petitioners to spend tens of thousands of dollars to prove at a trial that the statements are true when the record on the motion to dismiss and for summary judgment shows that the statements dealt with a matter of public concern and respondent cannot establish that petitioners published the statements with "actual malice" or that it suffered special damage. If the publishing industry faces this prospect every time it prints an article on public accommodations, then hotel owners have found an easy way to silence the press. Upon a record such as that presented here, interlocutory appellate review of denial of summary disposition is demanded by the rights which this Court has recognized as inherent in the First and Fourteenth Amendments.

THE QUESTIONS ARE SUBSTANTIAL

1. This Court, both in *New York Times* (p. 279) and *Hill* (p. 389) emphasized that "fear of the expense" of trial was as much a factor in its decision as fear of judgments rendered after trial. It is thus obvious that a corollary of the *New York Times* rule as set forth in that case and subsequent decisions by this Court is that grounds must be found in a proper case for summary disposition of actions prior to incurring the expense of trial. And expense is not the least of the hardships for a defendant which is subject to suit in most jurisdictions in this country and which must supply its editors as witnesses for protracted periods of time at the whim of any libel plaintiff whose suit is held to be immune to summary disposition.

A further corollary of this rule is that denials of such motions for summary judgment must be subjected to interlocutory review, for otherwise an erroneous denial of such

a motion leaves the movant without protection against unconstitutional damage. This procedure was first applied by the Court of Appeals for the District of Columbia in *Washington Post Co.* v. *Keogh,* 365 F. 2d 965 (D. C. Cir. 1966), *cert. denied,* 385 U. S. 1011. There summary judgment had been denied in the District Court and the Court of Appeals granted an application for leave to appeal pursuant to 28 U. S. C. § 1292 (b). The Court of Appeals reversed and granted summary judgment. It pointed out (p. 968):

> "In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate . . . . Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of law suits, they will tend to become self-censors. And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust, and less wide-open, for self-censorship affecting the whole public is 'hardly less virulent for being privately administered.' Smith v. People of State of California, 361 U. S. 147, 154, 80 S. Ct. 215, 219, 4 L. Ed. 2d 205 (1959)."

The two questions presented in all libel actions in which constitutional protection is sought are (1) what is it necessary to show *as a matter of law* in order to qualify for constitutional protection, and (2) what is it necessary to show *as a matter of law* in order to qualify for summary disposition, likewise mandated by the Constitution. We believe that this case presents both those questions to be ruled upon in favor of petitioners by this Court *as a matter of law.* If this Court does not reverse the denial of leave to appeal peti-

tioners will have been deprived of their constitutional right to summary disposition of the action.

We should emphasize that all we fear in connection with this case is, in the language of *New York Times* and *Hill*, "fear of the expense" of trial, for we have not the slightest doubt but that the case can be successfully defended on truth grounds should the action go to trial, in which case the constitutional questions we here present will never reach this Court. But petitioners will have been deprived of their constitutional right to summary disposition. The extent of that "fear of the expense" of trial may be illustrated by the fact that investigation expenses alone in this action total over $30,000—if it is necessary to go to trial the expense will total at least the equivalent amount. A trial will last at least three weeks and will involve the appearance of at least fifty witnesses. The trial will be long and expensive. In addition to evidence relating to truth of the ten particular statements claimed to be false, petitioners will have to introduce evidence about other deficiencies of the Bon Air in mitigation of damages. Petitioners will have to bring to Augusta as witnesses individuals from throughout the country who have been guests at the Bon Air. Extensive analysis of Bon Air finances at the trial will be necessary to establish lack of damages. Petitioners, reasonably anticipating a hostile forum inasmuch as the article was generally critical of Augusta, can chance cutting no corner in preparation. The financial burden of the trial in itself will be significant. The threat is real and we are entitled to be heard with respect to that threat.*

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*Fear of the expense of trial is an effective threat. According to one commentator:

> "... under the pre-existing law, the responsible press was most susceptible to unscrupulous use of the threat of libel action as a form of extortion. Even though assessment of court costs to unsuccessful plaintiffs, ethical standards of the legal pro-

In short, this case squarely presents to this Court a threatened and very real violation of the constitutional right to summary disposition, referred to by this Court in *New York Times* and *Hill* and granted in *Keogh*. If interlocutory review be not granted then rights recognized for the benefit of libel suit defendants in *New York Times* and subsequent cases are illusory.* If doctrines developed to protect the press are to be meaningful, it must be possible to obtain appellate review of lower court orders such as the order here before running the gauntlet of trial. That is the necessary constitutional corollary to the *New York Times* doctrine.

2. This Court should also expand upon its definition of "public figure" as introduced in *Butts*. If a public accommodation is not a "public figure" then we have, indeed, retrogressed.** We refer to the decision in *Flanagan* v. *Nicholson Publishing Co.*, 137 La. 588, 68 So. 964 (1915), relied upon by this Court in its majority opinion in *Butts* (p. 155). The *Flanagan* decision contained the following quotation from a Massachusetts case:

> fession, and general reluctance on the part of the bar to prosecute libel actions all operate to discourage such threats, the fact that the cost of defense alone can be prohibitive tends to sustain it. . . . If it is true that 'newspapers no longer settle out of court, but fight,' thus discouraging 'suits by the shyster lawyers who brought 90 per cent of the cases,' . . . it is a description that can only pertain to the large enterprises." Berney, *Libel and the First Amendment—A New Constitutional Privilege*, 51 VA. L. REV. 1, 34 n. 175 (1965).

*The Arizona Court of Appeals addressed this very point in *Klahr* v. *Winterble*, 4 Ariz. App. 158, 170, 418 P. 2d 404, 416 (1966):

> "If all actions of libel similar to this must go to a full jury trial in order to ascertain whether criticism by analogy, invective and satire is believed in 'good faith' to be 'true,' the light of freedom of speech and press as enunciated in *New York Times* will be frustrated."

**Compare the specific recognition of places of public accommodation in the Civil Rights Act of 1964, 42 U. S. C. §§ 2000a—2000a-6.

> "The editor of a newspaper has the right, if not the duty, of publishing, for the information of the public, fair and reasonable comments, however severe in terms, *upon anything which is made by its owner a subject of public exhibition,* as upon any other matter of public interest; and such a publication falls within the class of privileged communications for which no action can be maintained without proof of actual malice. Gott v. Pulsifer, 122 Mass. 238, 23 Am. Rep. 322." (Emphasis added.) 68 So. at 968.

The time has come to clarify the concept of "public figure" so that "its outer limits will be marked out by case-to-case adjudication" (*St. Amant* v. *Thompson,* U. S. , 88 Sup. Ct. 1323). The "public official" language in *New York Times* misled a number of lower courts into the belief that the *New York Times* principle was limited to "public officials". See *Clark* v. *Pearson,* 248 F. Supp. 188, 195 (D. D. C. 1965); *Fignole* v. *Curtis Publishing Co.,* 247 F. Supp. 595, 597 (S. D. N. Y. 1965); *Lorillard* v. *Field Enterprises, Inc.,* 65 Ill. App. 2d 65, 213 N. E. 2d 1 (1965); *Youssoupoff* v. *Columbia Broadcasting System, Inc.,* 48 Misc. 2d 700, 265 N. Y. S. 2d 754 (Sup. Ct. 1965). This Court quickly moved to clarify that misinterpretation in its decision in *Rosenblatt* v. *Baer,* 383 U. S. 75, 84-85, note 10. By the same token, this Court should make it clear that the concept of "public figure" is not limited to individuals such as Butts and Walker but also extends to matters of public concern such as public accommodations, *i.e.,* a public hotel. We had thought that this Court had made it quite clear that the concept of "public figure" was embraced within the concept of "public concern" in its explicit language in *New York Times* (p. 269), *Garrison* (pp. 74-75), *Rosenblatt* (p. 86), *Hill* (p. 387-88) and *Butts* (pp. 150, 152). However, it is evident that concept

has not been sufficiently implanted so that the District Court and the Fifth Circuit recognize the teaching of this Court's decisions—and undoubtedly by the same token, other courts will be in the same position and at a time when the concept is being presented in many cases throughout the country. It is thus vital that this Court, in this case, act with respect to the "public figure" concept as it did with the "public official" concept in *Rosenblatt.**

Professor Pedrick emphasizes that the public judgment requires enlightenment on a multitude of subjects:

> "... If a qualified 'good faith' privilege is needed to better assure open debate then the privilege ought to extend as stated by Judge Burch of Kansas to 'all matters of public concern.' The logic is simple. In modern democratic society the public judgment makes itself felt on a great variety of subjects in a great variety of ways, official and unofficial. If decision on these matters is to be adequately informed every effort ought to be made to free the channels of communication with respect to these subjects. *It is therefore the function of the first amendment to protect the freedom of speech and press on all those matters as to which there is some element of public participation.* At least on those issues where the public judgment can make itself felt through official or unofficial communication it can be said that the matter is one of proper public concern. The determination of 'matters of public concern' should thus become the key to the application of the privilege recognized in the *Times* decision." Pedrick, *Freedom of the Press and the Law of Libel: The Modern*

*This Court should alternatively rest its decision upon the question expressly left open in *Hill* (p. 397), namely, whether the "public interest" there found, and patently present here, suffices by itself to invoke the constitutional protection in a libel action.

Revised Translation, 49 CORNELL L. Q. 581, 592 (1964). (Emphasis added.)

3. Moreover, in this action, respondent has specifically disclaimed any special damage. In failing to give effect to that disclaimer by denying review the Fifth Circuit has patently transgressed the mandate of this Court in *Linn* v. *Plant Guard Workers,* 383 U. S. 53, 64-65, in which this Court, applying by analogy the principles of *New York Times,* noted, "We therefore limit the availability of state remedies for libel to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage."

It thus seems clear that the "special damage" requirement has become a constitutional one, demanding constitutional federal law application in all jurisdictions. However, confusion presently reigns in the state courts, contrary to this Court's decision in *Linn,* on whether a plaintiff must plead and prove special damage as well as "actual malice". The courts in two states, Illinois and Tennessee, have held that the decision in *New York Times* requires special damage. *Suchomel* v. *Suburban Life Newspapers, Inc.* 84 Ill. App. 2d 239, 228 N. E. 2d 172 (1967); *Lundstrom* v. *Winnebago Newspapers, Inc.,* 58 Ill. App. 2d 33, 206 N. E. 2d 525 (1965); *McNabb* v. *Tennessean Newspapers, Inc.,* 400 S. W. 2d 871 (Tenn. Ct. App. 1965). The Supreme Court of Pennsylvania has held that *New York Times* does not require proof of special damage, with a strong dissenting opinion on this point. *Fox* v. *Kahn,* 421 Pa. 563, 221 A. 2d 181 (1966). The New York decisions are presently split. *Compare Cole Fischer Rogow, Inc.* v. *Carl Ally, Inc.,* 29 App. Div. 2d 423, 288 N. Y. S. 2d 556 (1st Dep't 1968), with *Raffa* v. *Shilbury,* 24 App. Div. 2d 814, 263 N. Y. S. 2d 876 (3d Dep't 1965).

Clarification of this question by this Court is essential. If petitioners are correct, the complaint should be dismissed

since only general damages are alleged (R. 8). As the situation now stands, this would be the result in Illinois, Tennessee, and some New York courts, but not Pennsylvania, other New York courts, or the United States District Court for the Southern District of Georgia.*

4. This case also presents the unusual situation of a conflict within a Circuit. The denial of the petition for leave to appeal was passed upon by a panel composed of Judges Wisdom, Bell and Dyer. Previously, and on December 7, 1967, a different panel of the Fifth Circuit composed of Judges Tuttle, Gewin and Hunter had allowed a petition for leave to appeal in *Time, Inc.* v. *McLaney* (Fifth Circuit, Misc. 906, now No. 25585). Briefs are presently being filed and argument will be heard next fall—too late to have an effect on the disposition of this case. In that case, which likewise arose from denial of a motion for summary judgment by a United States District Court (Southern District of Florida), and in which that Court, in denying the motion had allowed an appeal pursuant to 28 U. S. C. § 1292(b), a Life article dealt with a subject-matter of public interest, *i.e.*, gambling in the Bahamas, and the subject was a public figure, *i.e.*, a professional gambler. Proof was presented, as it was here, by the writer of the article giving the basis upon which he wrote the article, his sources, and his good faith and belief in the truth of the article. For all practical purposes the *McLaney*

*It is revealing to note that the constitutional requirement that special damage be alleged is fully in accord with the common law requirement that when language concerns property or chattels actual or special damage must be alleged as an essential element of the cause of action. *See* 3 BLACKSTONE, COMMENTARIES *124; S. BOWER, ACTIONABLE DEFAMATION 210-12 (2d ed. 1923); RESTATEMENT OF TORTS § 633 (1938). The order of the District Court abolishing the requirement of special damage, which served to protect freedom of speech and press in the 18th century, constitutes an abridgment of the freedom of speech and press. Such an abridgment, the First Amendment, together with the Fourteenth Amendment, prohibits.

action and this action are, constitutionally, identical. To grant leave to appeal in the one action and deny that leave in the other is constitutionally impermissible.

The very fact of that conflict within a Circuit emphasizes the need for this Court to allow review here, for it is quite evident that its prior teachings in this field have not been fully appreciated by lower courts. Such a lack of appreciation is not surprising in view of the fact that this Court has explicitly limited libel doctrines that have stood unchallenged for many years after having been inherited from the British common law. That law enunciated two doctrines, *i.e.,* (1) it presumed falsity, malice and damage, and (2) it left "malice" as an ill defined concept and thus subject to proof in a variety of ways. Reason for those doctrines, although not appreciated in this country, was to protect and preserve the British caste system and, to that end, the British common law has functioned very effectively and still does today. Under it, no one may say ill of the upper class. But such doctrines should have no application in this country under our Constitution and a libel plaintiff should be made to prove his case as any other plaintiff, at the very least with respect to language dealing with a matter of public interest. Our lower courts still do not appreciate the very simple step this Court has taken in defining malice with precision and doing away with the presumptions. This case presents the opportunity to continue and, perhaps, go far towards completion of that education. The conflict within the Fifth Circuit graphically illustrates the necessity.

CONCLUSION

It is patent that the path to be pursued by this Court is one of clarification and, we believe, extension, of the application of the principles enunciated in *New York Times* and subsequent cases. *St. Amant* v. *Thompson,* U. S. , 88 Sup. Ct. 1323, fulfilled that function with respect

to extension of definition of "recklessness". This Court can fulfill that same function in this action by clarifying that the right of summary disposition presupposes the right to review its denial. The doctrine announced in *New York Times,* and broadened thereafter, will have little effect if appellate review of erroneous refusals to apply the constitutional privilege is not available until after the expense of a trial on the common law defense of truth. The matters involved can be more fully covered if there are to be briefs on the merits, although once it is decided that a public hotel is a "public figure" or a matter of "public interest" (which is a matter of simple solution) it is obvious that petitioners have shown freedom from "actual malice" and that respondent has disclaimed special damage, thus entitling petitioners to summary disposition of this case. Suffice it to say at this point the questions are substantial.

For the reasons stated, the petition should be granted.

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Respectfully submitted,

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